



SDMS DocID

268693

**GOODWIN, PROCTER & HOAR**

(A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS)

COUNSELLORS AT LAW

EXCHANGE PLACE

BOSTON, MASSACHUSETTS 02109-2881

TELEPHONE (617) 570-1000

TELECOPIER (617) 523-1231

TELEX 94-0640

CABLE: GOODPROCT, BOSTON

March 21, 1989

Barbara Newman  
Remedial Project Manager  
U.S. Environmental Protection  
Agency, Region I  
Waste Management Division  
(HRS-CAN 3)  
JFK Federal Building  
Boston, MA 02203-2211

Wells G and H  
JUL 31 1989

Re: Legal Comments on EPA's Proposed Remedy for Woburn  
Wells G and H

Dear Ms. Newman:

These comments are submitted on behalf of UniFirst Corporation. They discuss the legal basis established by CERCLA, as amended by SARA, and as implemented via the National Contingency Plan (NCP), for the selection of remedial actions for Superfund Sites. The comments then examine EPA's Proposed Remedy for the Wells G and H Superfund Site against these criteria, in light of the technical report on the proposed remedy and the underlying RI/FS studies by UniFirst's expert peer review panel. The comments conclude that EPA's proposed remedy is based on seriously flawed technical assumptions and analysis contained in the EBASCO Feasibility Study; that the proposed remedy fails to meet EPA's stated remedy selection criteria and will not achieve its stated objectives; that the proposed remedy is not supported by the data and analysis contained in EPA's administrative record; and that the proposed remedy, if selected would therefore be arbitrary and capricious and contrary to law when reviewed on the basis of the supporting studies and administrative record.

In light of these problems, UniFirst has proposed an alternative remedy for the Wells G and H Superfund Site, consisting of appropriate groundwater treatment and soil remediation at each of the five identified source areas. UniFirst believes that this proposed remedy is legally and technically preferable to EPA's proposed central treatment plant remedy. Even if EPA should decide to continue studying

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 2

EPA's proposed plan (which the peer review panel does not recommend), UniFirst asks EPA to permit it to begin cleaning up its own site immediately.

### A. EPA's Proposed Remedy and Rationale

In its Proposed Remedial Action Plan, EPA proposes a remedy for the Wells G & H Superfund Site consisting of two basic components. The first involves pumping contaminated groundwater from each of five identified source areas, as well as the central valley, and piping all the contaminated groundwater to a large, central, treatment plant located in the central Valley for treatment to drinking water quality via air stripping and pretreatment. Although EPA claims the water will be discharged to the River, let there be no mistake about the reason for proposing a \$7 million treatment plant to produce drinking water quality effluent to a highly polluted river: "In addition, the preferred groundwater alternative will provide a central treatment plant that can be used to help provide drinking water if water is needed before clean-up levels are reached." (Proposed Plan at 18.) The second component consists of treatment of contaminated soils via in situ aeration and/or incineration at each of the five designated source areas.

EPA states that its prime remedial objective in selecting this remedy is "restor[ing] the aquifer that supplied water to Wells G and H to drinking water standards as quickly as possible", as well as stopping the leaching of soil contaminants into the groundwater and migration of such contaminants from the identified source areas. (Proposed Plan at 7.) EPA's groundwater cleanup goals are based on maximum contaminant levels (MCLs) for the volatile organic compounds (VOCs) in question, and on a 10-6 excess cancer risk level for additional compounds for which MCLs do not exist. (Proposed Plan at 7.)

EPA evaluated the proposed remedy and several alternatives against nine remedy selection criteria derived from CERCLA. These include: (1) overall protection of human health and the environment; (2) compliance with applicable or relevant and appropriate requirements (ARARs); (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility or volume; (5) short-term effectiveness; (6) implementability; (7) cost; (8) state acceptance; and (9) community acceptance. (Proposed Plan at 18-20.)

GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 3

In reviewing the proposed remedy against these criteria, EPA states that the preferred alternative would remove contamination and restore the aquifer more quickly than other rejected groundwater alternatives and would permanently reduce contamination and achieve clean-up goals in the shortest amount of time; that the construction of one central treatment plant would be most technically feasible and administratively implementable; and that the proposed remedy is the least expensive alternative that would achieve EPA's cleanup goals. EPA further states that the soil treatment (source control) component of the remedy will take an estimated four years to implement, from the commencement of the design process, at a cost of \$3,200,000; and that the groundwater treatment (management of migration) component will require an estimated ten years for the central area and 20 to 50 years for source areas to implement from the commencement of design, and will cost an estimated \$37,100,000. EPA states that its evaluation of the remedial alternatives and selection of the preferred remedy is based on calculations and data found in the RI/FS by EBASCO Services Corporation (January 1989). (Proposed Plan at 20.)

In addition, as noted above, EPA also states that the central water treatment plan will have the collateral "benefit" of providing water that can be piped into the area's drinking water system. While EPA appears to be neutral towards this possibility, EPA failed to include in the administrative record the letter from the Massachusetts Department of Environmental Quality Engineering ("DEQE") which apparently was the origin of the Proposed Plan. That letter, dated August 17, 1988 and addressed to you (copy attached), stated as follows:

To begin, the Commonwealth suggests evaluating an additional alternative . . . . Included in this alternative would be pumping of contaminated groundwater from five source areas and at Wells G and H and treating the water at a central facility in the area of Wells G and H. Treated water would then be put into distribution for consumption. [Emphasis added.]

Similarly, we note that DEQE continued to urge EPA to adopt this "additional alternative" in a second letter only recently included in the administrative record, dated September 21, 1988 and addressed to Merrill S. Hohman (copy attached). That

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 4

letter stated that DEQE "strongly supports" that alternative because it includes two components not included in the other two "general treatment scenarios" that "have moved to the forefront" "[f]ollowing the release of the draft RI/FS in June 1989", viz:

- (1) a timely remediation of the contamination within the aquifer, and (2) it provides well head treatment which will allow immediate use of the groundwater as a drinking water supply. [Emphasis added.]

Finally, current state law and MWRA policy require that, as a "contract community", in order to continue to get MWRA water, Woburn must demonstrate that "no existing or potential water supply source for the local body has been abandoned unless the department of environmental quality engineering has declared that the source is unfit for drinking and cannot be economically restored for drinking purposes, . . . ." See attached MWRA "Policy and Procedures for Contamination of Water Supply" (February 8, 1988). Any doubt about DEQE's views on declaring Wells G and H "unfit for drinking" should be resolved by these paragraphs from DEQE's September 21, 1988 letter to Mr. Hohman:

It is no longer Woburn's problem alone that Wells G and H have been closed. As executors of the Water Management Act, DEQE must evaluate basin demand and yield projections such that communities will in the future have sufficient quantities of drinking water.

Several public water supply wells in the Commonwealth have experienced water quality problems similar to Wells G & H. They have successfully been treated with proven technologies and are once again supplementing water supplies. It is most important to demonstrate to the general public, through extended use and monitoring, the effectiveness of these treatment systems.

### Conclusion

Restoration of the groundwater should not be delayed simply because the aquifer is not currently in use as drinking water supply or because the community may express a preference not to so use it in the future.

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 5

Given the water supply need of the region, it is crucial that treatment at the individual source areas and at the wellhead be instituted.

Unless EPA has additional, subsequent information which is not in the record, EPA should make it clear to the public that its Proposed Plan will result in the more or less "immediate use of groundwater as a drinking water supply".

### B. Statutory and Regulatory Remedy Selection Criteria

#### 1. The Statute

The fundamental legal criteria for selecting a remedy for a Superfund site are established by CERCLA § 121, 42 U.S.C. § 9621, which was added to the statute by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Section 121 establishes four basic criteria for the selection of a remedial action: (1) the remedy must be protective of human health and the environment, § 121(a)-(b); (2) the remedy must be cost-effective on both a short term and long term basis, § 121(a)-(b); (3) the remedy should include treatment which permanently and significantly reduces the volume, toxicity or mobility of contaminants as a principal element to the maximum extent practicable, § 121(b); (4) and the selected remedy must meet applicable or relevant and appropriate state and federal environmental standards. § 121(d). Selected remedial actions shall also conform, to the extent practicable, to the National Contingency Plan (NCP) and shall be "relevant and appropriate under the circumstances presented by the release." § 121(a)(d). EPA's guidance on remedy selection states that the selected remedy should "represent the best balance" of these factors in terms of effectiveness, implementability and cost. EPA, Interim Guidance on Superfund Selection of Remedy (December 24, 1986).

CERCLA requires EPA to base its selection of the remedy upon the administrative record established during the site investigation and remedy selection process. CERCLA § 113(k). EPA's selection of a remedy is to be reviewed under the "arbitrary and capricious" standard of review, on the basis of the administrative record, which may be supplemented under appropriate circumstances. Id. § 113(j).

CERCLA also limits EPA's response actions at Superfund sites, and states that the EPA "shall not provide for a removal

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 6

or remedial action . . . . in response to a release or threat of release . . . . of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found," except in the event of public health or environmental emergencies where no other person can and will respond to the emergency in a timely manner. CERCLA § 104(a)(3).

Finally, CERCLA, as amended by SARA, required EPA to amend the NCP to conform it to the remedy selection standards and criteria added by SARA within 18 months after SARA's enactment. CERCLA § 105(b).

### 2. The 1985 NCP

The National Contingency Plan (NCP) provides EPA's regulatory blueprint for the selection and implementation of response actions at Superfund sites. The NCP is set forth at 40 CFR Part 300. The version of the NCP currently in effect was promulgated on November 20, 1985, 50 Fed. Reg. 47912. However, on December 21, 1988, EPA published its proposed comprehensive revisions to the NCP pursuant to SARA. 53 Fed. Reg. 51394 (December 21, 1988). Thus, while the 1985 NCP remains in effect until superseded by the final revised NCP, the proposed 1988 NCP revisions may be looked to as a source of guidance in the interim. EPA has also published a document entitled Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA (October 1988), which provides guidance on the RI/FS process for investigating Superfund sites and evaluating potential remedial options. This RI/FS guidance states that the objective of the RI/FS process is "to gather information sufficient to support an informed risk management decision regarding which remedy appears to be most appropriate for a given site". *Id.* at 1-1.

As noted above, CERCLA § 121(a) requires EPA's selected remedies to be consistent with the NCP, to the extent practicable. Also, EPA can recover its response costs relating to the site investigation, remedy selection and remedy implementation process, only to the extent that EPA's costs and activities are not inconsistent with the NCP. CERCLA § 107(a). Thus, EPA's proposed remedy must be evaluated against both the statutory remedy selection criteria set forth in CERCLA § 121 and the NCP.

The 1985 NCP contains a number of criteria governing the remedy selection process. EPA is required, in planning and

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 7

undertaking Fund-financed remedial actions, to the maximum extent practicable to: "(1) engage in prompt response; . . . (3) conserve Fund monies by encouraging private party cleanup; [and] (4) be sensitive to local community concerns". 40 CFR § 300.61(c).

Section 300.68 of the NCP establishes the procedures and criteria for the selection and implementation of remedial actions. This section establishes the RI/FS process and sets forth the following criteria for the screening of remedial alternatives during the FS: (1) cost; (2) acceptable engineering practices (including feasibility for site specific conditions and reliability); (3) and effectiveness. § 300.68(g). This provision states that "if an alternative has significant adverse effects, and very limited environmental benefits, it shall . . . be excluded from further consideration."

Following the initial screening, a "detailed analysis of alternatives" must be undertaken, including a detailed cost estimation; evaluation in terms of engineering implementation, reliability and constructability, and an assessment of the extent to which each alternative is expected to effectively prevent, mitigate or minimize threats to, and provide adequate protection of, public health and welfare and the environment. Adverse environmental impacts must be analyzed, including methods for mitigating these impacts and the costs of mitigation. *Id.* § 300.68(h).

The 1985 NCP states that the EPA shall select a "cost-effective remedial alternative that effectively mitigates and minimizes threats and provides adequate protection of public health and welfare and the environment", and which attains or exceeds applicable or relevant and appropriate public health and environmental standards (ARARs). *Id.* § 300.68(i). In selecting among remedial alternatives that will achieve adequate protection of health, welfare and the environment, EPA must consider cost, technology, reliability and administrative and other relevant concerns. *Id.*

### 3. The 1988 Proposed NCP Revisions

The 1988 proposed NCP revisions propose to amend and supplement the 1985 NCP, primarily to implement SARA's § 121 remedy selection standards. 53 Fed. Reg. 51394 (Dec. 21, 1988). One of the themes in the proposed revisions is to

GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 8

streamline EPA's remedy selection and implementation process in response to public and congressional criticism of the slow pace of Superfund cleanups. Thus, the Preamble declares EPA's "bias for initiating response actions necessary or appropriate to eliminate, reduce or control hazards posed by a site, as early as possible." 53 Fed. Reg. at 51423.

In the FS process, EPA identifies three general criteria for the development and screening of remedial alternatives: effectiveness, implementability and cost. 53 Fed. Reg. at 51427-28. An EPA attorney responsible for the drafting of the proposed NCP revisions explains that "[a]lternatives would be screened out if they were not adequately protective, could not be implemented within a reasonable time, or if they cost more than other comparably effective alternatives." Freedman, Proposed Amendments to the National Contingency Plan: Explanation and Analysis, 19 ELR 10103, 101139 (March 1989).

In addressing groundwater contamination, EPA states in the Preamble that "the goal of EPA's Superfund approach is to return usable groundwaters to their beneficial uses within a time frame that is reasonable given the particular circumstances of the site," and states a preference for rapid restoration of contaminated groundwater that can be used for drinking water "wherever cost-effective and practicable." 53 Fed. Reg. at 51433. However, the EPA commentator states that groundwater that is unsuitable for human consumption due to widespread contamination and which does not threaten drinking water supplies would be addressed differently in terms of cleanup levels and restoration. Moreover, widespread groundwater contamination due to multiple sources is to be addressed in a limited manner, so that the Superfund response action will address only the contribution from the Superfund site to the widespread multi-source contamination. 53 Fed. Reg. at 51435. See Freedman, supra, 19 ELR at 10119.

The proposed 1988 NCP revisions present nine criteria for detailed analysis of remedial alternatives that survive the screening process, and for selecting the ultimate remedy. These criteria, which are identical to those stated by EPA in its Proposed Remedy document, are: (1) overall protection of human health and the environment; (2) compliance with ARARs; (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility or volume; (5) short-term effectiveness; (6) implementability; (7) costs; (8) state acceptance; and (9) community acceptance. Proposed § 300.430(e)(9). While the



## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 9

first two criteria must be met in all instances, the remaining seven factors are to be balanced, and the selective remedy is the one that strikes the best balance among these criteria. Proposed § 300.430(f)(3).

### C. Analysis of EPA's Proposed Remedy

When viewed against the above statutory and regulatory criteria, and in light of the serious flaws in the EBASCO FS on which EPA relied in applying these criteria, we believe that EPA's proposed remedy is arbitrary and capricious, and unsupported by the administrative record; and therefore should be thoroughly reevaluated.

UniFirst's peer reviewers, Drs. John Cherry, Martin Johnson, and Rudolph Jaeger, together with the consulting firms of The Johnson Company and ENSR Consulting and Engineering, thoroughly reviewed EPA's proposed remedy, the EBASCO FS and Supplemental RI, the public health hazard evaluation report, and the other various RI reports, appendices, and additional data contained in the administrative record. In addition, UniFirst's consultants have undertaken extensive hydrogeological studies on and downgradient of the UniFirst site to enhance their understanding of the hydrogeological system and contaminant distribution on and in the vicinity of the UniFirst property. Our consultants' work was made difficult by the short public comment period provided by EPA for the review of the proposed remedy and FS, and by the absence of critical supporting data and documentation in the various reports, appendices and administrative record. In fact, the very document that first proposed the remedy ultimately selected by EPA does not appear in the administrative record at all. This six-page letter dated August 17, 1988 from Geologist Jay Napartstek, of DEQE's division of Hazardous Waste, was addressed to Barbara Newman of EPA; we obtained it March 20, 1989 from DEQE.

On the basis of their review and analysis, UniFirst's eminent consultants have concluded that the reports on which the proposed remedy is based are of poor technical quality, and suffer from severe basic conceptual and engineering errors, which invalidate a number of the assumptions which support the preferred remedy. Among other major flaws in the EBASCO analysis are that it: (1) ignores the multiple and uncontrollable contaminant sources outside of the site in the heavily urbanized and polluted Aberjona watershed; (2) ignores

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 10

the effect of the polluted Aberjona River as a continuing contaminant source under pumping conditions; (3) ignores the potentially major contribution of the bedrock and naturally occurring radionuclide contamination therein as an aquifer recharge source under pumping conditions at Wells G and H; (4) ignores the distinct and unique characteristics of each of the five identified source areas in terms of physical site characteristics, contaminant distribution, concentration, and resulting influent water quality to a treatment system; (5) nevertheless inappropriately applies the same generic groundwater pretreatment and treatment train to these highly variable sources; and (6) completely mis-diagnoses the purported contamination of surficial soils on the UniFirst property. The administrative record thus does not support EPA's remedy decision.

In light of these and other pervasive flaws in the EBASCO analysis discussed in detail in the attached report, UniFirst's experts have concluded that EPA's proposed central treatment plant scheme is a poor remedial choice which will not achieve its stated objectives of rapid aquifer restoration. By drawing contaminants from the Aberjona River and the bedrock (including PAHs and radionuclides) into the aquifer through pumping in the central valley, EPA's proposed remedy will introduce new and essentially uncontrollable sources and types of contaminants into the aquifer which are likely to render it permanently unsuitable as a public water supply.

Such a result violates key criteria which EPA has bound itself to satisfy. In particular, the proposed remedy will not protect human health or the environment in either the long- or short-term. Nor will it permanently and significantly reduce the volume, toxicity or mobility of contaminants to the maximum extent possible. The NCP dictates that such an ineffective remedial alternative that "has significant adverse effects and very limited environmental benefits" should have been excluded from consideration by EPA.

Moreover, the proposed remedy does not satisfy the criterion of cost-effectiveness. EBASCO's flawed engineering design and cost analysis inappropriately inflated the cost of the individual treatment plants in the source areas, and therefore artificially enhanced the apparent cost-effectiveness of the central treatment plant scheme. When an appropriate site-specific engineering design and cost analysis is performed, the individual source-specific treatment plants are

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 11

shown to be a superior remedial approach in terms of EPA's stated remedy selection criteria, including effectiveness in removing VOCs, rapid implementability, short- and long-term effectiveness and cost.

EPA's criterion of implementability is affronted both by the engineering flaws discussed above and by the barrier which the proposed remedy erects to prompt settlement. UniFirst's proposal to install a site-specific VOC pumping and treatment system on its own property offers the significant advantage that remedial action can be commenced very rapidly. The recovery well from which pumping would occur is already in place. UniFirst is willing to voluntarily undertake to control the VOCs on and emanating from its property. The treatment plant would be relatively small, and would rely on proven technology. Pretreatment would be minimal, or perhaps unnecessary. UniFirst's experts' calculations show that by implementing its proposed source-specific treatment plant, UniFirst can essentially abate all VOCs (principally PCE) attributable to its site before EPA's complex central treatment system could commence operation. (Note that it took approximately 6 years for the Dedham Water Company just to bring its similar large-scale treatment plant on line.) Similar arguments are likely to apply to the other source locations, where the individual PRPs are more likely to be willing and able to remedy the problems associated with their own sites rather than to contribute to EPA's costly and dubious central treatment plant system. Thus, the multiple treatment plant alternative is likely not only to be more rapidly implementable and to show more prompt results, but it is likely to facilitate an early settlement with respect to the Wells G and H site.

Most significantly, the EBASCO report and, therefore, EPA's remedial decision, do not even advert to key applicable or relevant and appropriate state environmental requirements (ARARs) as required, not only by CERCLA § 121(d)(2), but also by its own protocol, described above. The extensive central pumping and treatment plant proposed can only be--and was--justified as an attempt to provide public drinking water. Nevertheless, the EBASCO report does not refer to, and the agency did not consider, Massachusetts drinking water regulations that relate to protection of drinking water supplies. See 310 C.M.R. § 22.20, 22.21.

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 12

In particular, EPA has not allowed for compliance with 310 C.M.R. § 22.21(2) which requires that "[s]uppliers of water shall acquire sufficient land around wells, infiltration galleries, springs and similar sources of ground water used as sources for drinking water to protect the water from contamination". Given the highly industrialized development of the area surrounding Wells G and H, and its contiguity to several major highways (even without allowing for the enormity of the area covered by the watershed that feeds the Wells G and H aquifer), as a practical matter, this ARAR cannot be met for a drinking water supply generated from Wells G and H. In order to protect public health, DEQE would almost certainly need to extend the distances around the wells that would need to be owned by the suppliers beyond the 250 to 400 feet contemplated in the regulation.

Because the aquifer is fed by the nearby Aberjona River, 310 C.M.R. § 22.20, which pertains to protection of surface waters used as sources of drinking water supply, is also relevant. Although the river is not impounded and thus may be excepted under 310 C.M.R. § 22.20(1), the rules are instructive in the level of protection they require to be afforded to surface waters used for drinking. These regulations dictate forms of protection that are impossible to achieve in the congested, industrialized Aberjona valley. Section 22.20(3), for example, prohibits discharge into surface waters used for drinking water of coliform, commercial waste products or polluting liquids, among other contaminants. UniFirst's technical report shows that discharge of human excrement, industrial refuse, and polluting liquids into the Aberjona River due to the highly developed character of the area is unavoidable. Most notably, highway run-off from Routes 128 and 93 makes introduction of highly toxic hydrocarbons into the river inevitable.

Also relevant are the regulations designed to protect waters and watersheds used by the Metropolitan District Commission for the water supply of any town or water company under the authority of M.G.L. c. 92, § 17. See 310 C.M.R. 23.00. Among other water bodies, these rules protect the Quabbin Reservoir, the source that has replaced Wells G and H in supplying public water to Woburn. The citizens of Woburn should be entitled to at least an equivalent level of protection for the waters that supply Wells G and H if these wells are to be used as a public drinking water supply. Yet,

## GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 13

such a level of protection is patently unattainable for Wells G & H. Within the watershed of any MDC waters, the regulations prohibit construction of any industrial or commercial facility generating hazardous wastes without DEQE approval. 310 C.M.R. § 23.02(2). Construction of any slaughterhouse or facility for treatment of animal skins without DEQE approval is also forbidden, 310 C.M.R. § 23.02(6). Yet it is well-known that numerous tanneries exist or formerly existed in the vicinity of Wells G and H. Given its stated goal of providing public drinking water supplies via Wells G and H, EPA should have considered whether the groundwaters or watershed supplying the aquifer could be adequately protected in accord with these regulations. The accompanying technical report shows that they cannot be.

For the Woburn site, the community acceptance criterion should be particularly stressed. In light of the points made by UniFirst's experts, the only remaining justification for EPA's decision to reject site-specific treatment plants, and to propose the central valley treatment plant, is to establish a large PRP-funded drinking water treatment plant to service the City of Woburn. Indeed, it appears from the letters discussed above that DEQE's strong advocacy of such a treatment plant for drinking water purposes was a dominant factor in EPA's decision to reject site-specific treatment and to propose the central treatment plant. UniFirst understands that the citizens of Woburn are strongly opposed to redeveloping Wells G and H, or any other groundwater supply of drinking water in the Aberjona Valley, as a source of drinking water for the City of Woburn.

The history of the public health problems in Woburn allegedly associated with drinking water from Wells G and H, and the resulting litigation and controversy, suggest that EPA's plan will meet with strong public opposition when viewed as a drinking water supply project. Indeed, EPA's Proposed Remedy Document states that "the preferred groundwater alternative will provide a central treatment plant that can be used to help provide drinking water if water is needed before cleanup levels are reached." Again, since aquifer restoration will not be achieved by EPA's treatment scheme, this is the sole remaining justification for the proposed remedy.

In any case, if the provision for a public drinking water supply from Wells G and H is in fact the goal of EPA's remedial choice, EPA's reasoning is profoundly misguided. Simply stated, the Aberjona aquifer in the vicinity of Wells G and H

GOODWIN, PROCTER & HOAR

Barbara Newman  
March 21, 1989  
Page 14

is not a suitable source of public drinking water, even if all VOCs are removed from the aquifer.

Finally in this regard, as noted above, the administrative record does not contain the document in which the state first proposed the remedy that EPA has now adopted, the letter dated August 17, 1988 from DEQE's Division of Hazardous Waste. DEQE there describes the key benefit of the proposed remedy to be the result: "Treated water would be put into distribution for consumption." In the same letter, referring to levels of PAHs, arsenic, cadmium, chromium, lead, iron, manganese and mercury found in sediments in the Aberjona River and Wells G and H area, DEQE complains that "the remedial alternatives discussed in the FS do not address wetlands or sediments and give no reason why they will not be addressed".

The proposed remedy may indeed attempt to address the presence of these substances by means of the proposed central treatment plant, but none of these substances are related to the VOC contamination attributed to the PRPs. In fact, it is clear from UniFirst's experts' technical report that, if the objective were merely to remediate the levels of VOCs contributed by the PRPs (who will pay for the remedy) so that they conform to drinking water standards, far less expensive treatment would be appropriate. Since the inorganics DEQE complained of need not be eliminated to treat the VOCs to conform to drinking water standards, the only conceivable goal of the proposed treatment is in fact to make the water drinkable.

Aside from the probable rejection of this drinking water source by the City of Woburn, EPA's plan to compel the PRPs to cleanup background contamination of substances which they did not introduce into the environment offends equity. As noted above, EPA itself has stated that it would not seek to restore contaminated groundwater for use as drinking water where groundwater is unsuitable for human consumption due to widespread contamination and where drinking water supplies are not threatened. 53 Fed. Reg. at 51433. In this case, EPA is violating its own declared guideline according to which widespread groundwater contamination due to multiple sources should be handled in a limited manner so that a response action addresses only the contribution from a specific Superfund site to that widespread multi-source contamination. 53 Fed. Reg. at 51435. At such multi-facility sites, EPA is not entitled to require the PRPs to remediate contamination which they did not cause. See Dedham Water Co. v. Cumberland Farms, Inc., 689

GOODWIN, PROCTER & HOAR


Barbara Newman  
March 21, 1989  
Page 15

F.Supp. 1233 (D.Mass. 1988). Moreover, joint and several liability does not apply in cases where the harm is divisible, or can be reasonably apportioned (for example between sources of metals versus VOCs). U.S. v. Chem-Dyne Corp., 572 F.Supp. 802, 811 (S.D. Ohio 1983); U.S. v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988). Thus, a PRP cannot be held liable for types of hazardous substances they did not release. See also U.S. v. Ottati & Goss (II), 28 ERC 1683, 1704 (D.N.H. 1988) (generator defendants not liable for cleanup of metals, absent evidence that defendants were responsible for presence of same). See also CERCLA, § 104(a)(3) (EPA "shall not provide for a removal or remedial action in response to a release . . . of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found").

EPA has considered inappropriate factors in choosing its preferred remedy. On this basis, even in the absence of the technical flaws noted above, EPA's proposed remedy is arbitrary and capricious, and must be reconsidered. See Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

The public desires a prompt and effective cleanup of VOC sources at the Wells G & H site. Thus far, 10 years have passed since the discovery of the problem in 1979, with much study but essentially no remedial action to date. UniFirst's proposed remedial alternative would quickly and effectively clean up the VOC releases attributed to its property and other source areas, without the excessive cost, complexity, controversy and adverse consequences inherent in EPA's preferred remedy.

Sincerely,

  
Jeffrey C. Bates

  
Christopher P. Davis

XP-1216/u